Supreme Court, U.S.
FILED
DEC 14 1984
ALEXANDER L. STEVAS
CLERK

No. 83-2166

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PHILIP Q. ZAUDERER,

Appellant,

v.

OFFICE OF DISCIPLINARY COUNSEL OF THE SUPREME COURT OF OHIO,

Appellee.

On Appeal from the Supreme Court of Ohio

BRIEF AMICUS CURIAE OF A. H. ROBINS COMPANY, INCORPORATED, NOMINALLY IN SUPPORT OF APPELLEE

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QUESTION PRESENTED

Amicus A. H. Robins Company, Incorporated, addresses in this brief the sole question of whether the Joint Appendix filed by the parties accurately presents certain facts relating to Amicus and the Dalkon Shield.

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INTEREST OF AMICUS

A. H. Robins Company, Incorporated ("Robins"), is a pharmaceutical company headquartered in Richmond and incorporated under the laws of Virginia. Between 1971 and 1974, Robins manufactured and nationally marketed an intrauterine contraceptive device (IUD) known as the Dalkon Shield.

The appeal in this case centers upon the constitutionality of the imposition of sanctions upon the Appellant, Philip Q. Zauderer, for certain advertisements of his services as an attorney. The advertisement chiefly in question was directed to prospective plaintiffs who might

have causes of action against Robins for injuries allegedly caused by the Dalkon Shield.

Appellant's claim to have demonstrated the social utility of his acts rests, in part, upon the underlying assumption that the Dalkon Shield has been demonstrated to be a defective and unreasonably dangerous device. Robins appears in this appeal for the limited purpose of establishing that the matters contained in the Joint Appendix concerning the Dalkon Shield and Robins are mere allegations.

Robins has received permission from both parties for the submission of this brief.

OPINIONS BELOW, JURISDICTION, CONSTITUTIONAL PROVISIONS AND RULE INVOLVED, AND STATEMENT OF THE CASE

We adopt the statement of the Opinions Below, Jurisdiction, Constitutional Provisions and Rule Involved, and Statement of the Case set forth by the parties except to the extent that the Statement of the Case is amended by the Argument below.

ARGUMENT

By engaging in defendant-specific advertising, Appellant occasioned the filing of litigation against Robins. Appellant now challenges the constitutionality of disciplinary actions against him based, in part, upon a claim that his advertising caused the filing of meritorious actions and also induced women to act to prevent injury. The underlying assumption is that the Dalkon Shield has been demonstrated to be defective and unreasonably dangerous. In fact, no such adjudication has been made in this case.

The parties filed a Joint Appendix in this Court on November 5, 1984. Beginning at page 9 of that document, there appears a "Stipulation of Fact Between Relator and Respondent" which recites that the parties "stipulate and agree that the following facts are true and can and should be treated as such by the Board [of Commissioners on Grievances and Discipline of the Supreme Court of Ohio]." JA 9. The Stipulation, in turn, relies upon certain alleged "facts" concerning Robins and the Dalkon Shield which were "found * * * to be true" by a retired District Court judge in another disciplinary case in Minnesota, *Matter of Discipline of Appert*, 315 N.W.2d 204 (Minn. 1981). The putative facts about the Dalkon Shield and Robins include statements to the effect that the IUD was defective and dangerous, known to be so prior to and after its sale, and marketed with the aid of misrepresentations by Robins. JA 19.

In fact, the matters recited in the Stipulation have never been determined in an adversarial context in this action or in the Minnesota action cited by the parties. Robins was not a party in the proceedings below, nor was it a party in the *Appert* proceedings in Minnesota. The "facts" offered by Appellant in support of his argument for the social utility of his advertising were not challenged, tested or opposed by any party to this action and were not the product of any adversial proceeding in the cited Minnesota action. The Appellee in the instant proceeding, for example, did not even attend the depositions of certain of Appellant's "expert witnesses". Brief of Appellant at 5.

That the "facts" allegedly found by the retired judge in the Minnesota action were never litigated and reflected only the contentions of the respondents therein is attested to by the declaration of the Minnesota Supreme Court in that very proceeding:

> We note initially that the statements concerning the activities of A.H. Robins Company made in this opinion are intended to reflect only the contentions of respondents to the disciplinary proceedings and are not indicative of any judicial determination of

these issues as it might affect A.H. Robins. A.H. Robins has never been a party to and did not present evidence concerning the allegations in these proceedings. [*Matter of Discipline of Appert*, 315 N.W.2d at 205 n.1.]

CONCLUSION

Insofar as Appellant's claim of unconstitutionality rests in any way upon his allegations that meritorious actions were filed against Robins and injury was prevented, we respectfully urge the Court to note the admonition of the Minnesota Supreme Court that these allegations "reflect only the contentions of the respondents * * * and are not indicative of any judicial determination of these issues * * *."

Respectfully submitted,

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